83-504

In the

Supreme Court of the United States

OCTOBER TERM, 1983

No.

FIELD CONTAINER CORPORATION,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FIELD CONTAINER CORPORATION
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QUESTIONS PRESENTED

1. Whether demurrage charges may properly be assessed in situations where actual delivery is impossible because of conditions not attributable to the shipper or consignee.

2. Whether the Interstate Commerce Commission may impose upon a consignee conditions not set forth in a published tariff.

Parties To The Proceedings In The Seventh Circuit Court of Appeals

1. Field Container Corporation, petitioner.
2. United States of America, respondent.
3. Interstate Commerce Commission, respondent.
4. The Chicago & Northwestern Transportation Company, intervenor.

Certificate of interest:

Field Container Corporation is a privately owned corporation and owns no interest in any other company.

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Petitioner, FIELD CONTAINER CORPORATION, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in *Field Container Corporation* v. *Interstate Commerce Commission, et al.*, No. 82-1656.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 712 F.2d 250 (7th

Cir. 1983) and is appended hereto as Appendix A. The opinion of the Interstate Commerce Commission has not officially been reported and is appended hereto as Appendix B.

JURISDICTION

The judgment and opinion of the Court of Appeals were entered on June 28, 1983. This Court has jurisdiction under 28 U.S.C. §§2350 and 1254(1) to review the judgment of the Court of Appeals by writ of certiorari.

STATUTES INVOLVED

The statutes involved are 28 U.S.C. §2321(a); 28 U.S.C. §2342(5); 28 U.S.C. §1336(a); and certain sections of the Revised Interstate Commerce Act, 49 U.S.C. §§10741(a) and (b); 10761(a) and 11701(b). All statutes involved are appended hereto as Appendix C.

STATEMENT OF THE CASE

A. Nature of the Action

This is an action to review the decision of the Seventh Circuit Court of Appeals upholding a final order of the Interstate Commerce Commission (COMMISSION) which found that demurrage charges asserted by the CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY (C&NW) against FIELD CONTAINER CORPORATION (FIELD) were not unreasonable and which ordered FIELD to pay the charges asserted. A brief description of the nature and types of demurrage charges will clarify the issues.

B. Description of Demurrage Charges

Demurrage charges are charges assessed by a railroad when shippers or consignees hold railroad cars for longer than a specified "free time." *Atchison, Topeka & Santa Fe Railway* v. *ICC*, 687 F.2d 912, 914 (7th Cir. 1982). The Commission regulates demurrage charges pursuant to its car service rules. *Id.* Although demurrage charges serve to compensate the railroads for use of their cars, they also exact a penalty for delay.

Demurrage charges are assessed under a nationwide demurrage tariff which provides two methods for computing the charges.[1] The first method is known as "straight demurrage" and applies unless the shipper affirmatively elects to use the alternative method, known as the "general average agreement." Under "straight demurrage," for every day beyond the prescribed "free time" (here, 2 days) during which the shipper or consignee keeps a car, he must pay the railroad $10 per day for the first four days, $20 per day for the next two days, and $30 per day for each succeeding day. Demurrage charges in excess of $10 per day are a penalty. If the shipper and railroad have agreed to use the "general average agreement," the daily demurrage charges are the same, but the shipper receives a $10 credit when he returns a car within 24 hours of receipt.

Demurrage charges assessed under "straight demurrage" are excused when delays result from floods, earthquakes, tornados or hurricanes. No excuses are available under the "general average agreement." In this case,

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[1] FREIGHT TARIFF 4-K, ICC H-74, General Car Demurrage Rules and Charges.

demurrage charges were assessed under the "general average agreement."

C. Course of Proceedings

Petitioner, FIELD, filed a complaint with the Commission seeking a ruling that demurrage charges assessed by C&NW were inapplicable, or if applicable were unreasonable, unduly discriminatory, and unlawfully preferential and prejudicial. The complaint was filed pursuant to section 11701(b) of the Revised Interstate Commerce Act, 49 U.S.C. §11701(b).

The Commission handled the matter under modified procedure, under which each side submitted its pleadings and affidavits to an administrative law judge. The administrative law judge dismissed the complaint, finding that petitioner had failed to prove its case. Petitioner appealed the decision of the Commission and the decision was reversed by Review Board No. 1.

C&NW appealed the Review Board's decision to the full Commission. The Commission reversed the Review Board's determination and ordered FIELD to pay demurrage to C&NW in the amount of $18,870.00.

Petitioner appealed the Commission's decision to the Seventh Circuit Court of Appeals, and also to the United States District Court for the Northern District of Illinois. The District Court stayed action on the appeal filed before it, pending action by the Seventh Circuit Court of Appeals. Since federal statutes provide a bifurcated system for appealing Commission orders, it was necessary for petitioner to file an appeal in both forums to protect its rights until the jurisdictional issue was settled.

The Seventh Circuit Court of Appeals found that it had jurisdiction to consider petitioner's appeal pursuant to Section 2321(a) of the Judicial Code. Section 2321(a) gives courts of appeals jurisdiction to review final orders of the Commission, except where Congress has provided otherwise. Section 1336(a) of the Judicial Code gives district courts jurisdiction to enforce or enjoin "any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures."

The court below found that it had jurisdiction because petitioner sought an order enjoining C&NW from collecting the demurrage charges and also sought reformation of the agreement under which demurrage charges were asserted. The court found that where a complaint seeks equitable relief as well as an order that demurrage is not due, proper review jurisdiction is in courts of appeals rather than district courts.

D. Statement of Facts

FIELD is a manufacturer of paperboard containers. Paperboard is manufactured from rolls of pulpboard which FIELD receives by rail. C&NW is the only railroad serving the FIELD plant in the Chicago, Illinois switching district.

In 1969, FIELD and C&NW entered into a "general average agreement" covering demurrage charges. During the ten years in which the parties operated under the general average agreement, a business practice developed in which C&NW, after notifying FIELD of the arrival of cars in C&NW's yard, would deliver only the cars specified by FIELD.

The demurrage charges at issue in this proceeding accrued during the period from December, 1978 through March, 1979. During this period, the Chicago area experienced one of its worst winters in history. Large accumulations of snow and exceptionally low temperatures severely hampered business activities throughout the area. These unusual and unprecedented winter conditions delayed the handling of rail cars. As a result, C&NW was unable to move out of its yard several cars which should have been delivered to FIELD. There is no question that FIELD was prepared to handle the cars if they had been delivered. FIELD spent approximately $8,000.00 and hired extra personnel in order to clear its tracks and make certain that it could handle the rail cars despite the weather conditions. Nevertheless, C&NW claimed that it "constructively" delivered to FIELD cars which C&NW could not move out of its own rail yard, and billed FIELD for demurrage charges for the substantial time these cars spent in C&NW's yard.

REASONS FOR GRANTING THE WRIT

The decision of the Seventh Circuit Court of Appeals is in conflict with decisions of other federal courts and with applicable decisions of this Court. The issue in this case is whether C&NW is entitled to demurrage charges for cars which arrived at C&NW's yard and which it claimed were "constructively" placed when it notified FIELD of their arrival. Constructive placement is defined in the applicable tariff as occurring when actual delivery is prevented by an act of the shipper or the consignee. In this case the delay in actually delivering the cars occurred because C&NW was unable to make actual delivery to FIELD. The Commission ignored terms of the tariff defining "constructive" placement and held that because there was a long-standing business practice whereby C&NW would deliver only the cars specifically requested by FIELD, that FIELD had to request delivery before it could claim that C&NW was unable to deliver the cars. The Court of Appeals has upheld an order of the Commission which allowed the terms of a published tariff to be modified on the basis of the past business practices engaged in by FIELD and C&NW.

It has long been held that filed tariffs have the force of law. *Illinois Steel Co.* v. *Baltimore & Ohio Railroad*, 320 U.S. 508, 513 (1944); *Illinois Central Gulf Railroad* v. *Golden Triangle Wholesale Gas Co.*, 586 F.2d 588, 592 (5th Cir. 1978); *Southern Pacific Co.* v. *Brown, Alcantar & Brown, Inc.*, 409 F.2d 1331, 1332 (5th Cir. 1969); *Compania Anonina Vanezolane de Navegacion* v. *A. J. Perez Export Co.*, 303 F.2d 692, 696 (5th Cir.), *cert. denied*, 371 U.S. 924 (1962).

In numerous cases, Courts have relied on this principal to refuse to grant shippers and consignees relief from charges asserted by the railroad. Shippers and consignees have been unable to avoid payment of tariff charges even where the carrier quoted a different rate, *Louisville & Nashville Railroad* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Illinois Central Gulf Railroad, supra; Atchison, Topeka & Santa Fe Railway* v. *Bouzidan*, 307 F.2d 230, 235 (10th Cir. 1962), or entered into a contract for a different rate. *Texas & Pacific Railway* v. *Mugg & Dryden*, 202 U.S. 242 (1906); *Cincinnati, New Orleans & Texas Pacific Railway* v. *Chesapeake & Ohio Railway*, 441 F.2d 483 (4th Cir. 1971). Nor have courts allowed individual hardship to modify strict adherence to the tariff. *New York Central & Hudson River Railroad* v. *York & Whitney Co.*, 256 U.S. 406 (1921).

Whether C&NW was entitled to the demurrage charges depends upon a finding that the cars had been "constructively" placed. The tariff clearly and unambiguously defines "constructive" placement as follows:

> When a car consigned or ordered to a private track, or industrial interchange track, or other-than public-delivery track cannot be actually placed because of a condition attributable to the consignor or consignee, such car will be held at destination, or if it cannot reasonably be accommodated there, at an available hold point and notice shall be sent or given the consignor or consignee that the car is held (naming the hold point if not held at destination) and that this railroad is unable to effect placement; however, if car is placed on the private track, industrial interchange track or other-than-public-delivery track serving the consignor or consignee, the

> car shall be considered constructively placed without notice.[2]

In this case, C&NW was unable to deliver the cars because of the weather, not because of any "condition attributable to the consignor or consignee." The fact was not disputed in the commission proceeding.

In its final order, however, the Commission concluded that, despite the clear language of the tariff, constructive placement had occurred. The Commission accepted C&NW's theory that, over the years during which C&NW and FIELD had operated under the demurrage average agreement, C&NW's practice of notifying FIELD when cars arrived, and FIELD's practice of telling C&NW which cars to deliver effectively modified the terms in the tariff. The Commission concluded that the "arrangement implemented the average agreement and, in effect, defined constructive placement." The Commission completely ignored the provision in the applicable tariff which clearly and unambiguously provided that "constructive" placement could occur only where a railroad was unable to deliver rail cars due to a "condition attributable to the consignor or consignee." Moreover, neither the Commission nor the Court of Appeals made any finding that the language in the tariff defining constructive placement was in any manner ambiguous or in need of modification.

The Court of Appeals held that the Commission's interpretation of constructive placement was reasonable, despite the fact that the Commission ignored the ap-

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[2] Item 545 of the National Demurrage Tariff, Tariff ICC H-74 (G & Trzasaka, Agent).

plicable tariff and ordered charges that were not required by the tariff. By ignoring the tariff, the Court of Appeals and the Commission acted contrary to the long line of cases holding that tariffs may not be modified by agreement between the parties to the transportation or by custom and usage.

In effect, the Court of Appeals and the Commission have estopped FIELD from relying on the express terms of the tariff.

The decision has important and far-reaching effects. It indicates that shippers, consignees and carriers cannot rely upon the express terms in published tariffs. By allowing tariffs to be modified by custom or common business practice, the decision permits railroads to avoid their tariff obligations, and makes it much easier for carriers to engage in unlawful discrimination among its shippers.

CONCLUSION

For the reasons stated herein, petitioner respectfully prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 82-1656

FIELD CONTAINER CORPORATION,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY,

Intervening-Respondent.

On Petition for Review of an Order of the Interstate Commerce Commission.

ARGUED APRIL 15, 1983—DECIDED JUNE 28, 1983

Before PELL and POSNER, *Circuit Judges*, and BROWN, *Senior Circuit Judge.**

POSNER, *Circuit Judge.* Field Container Corporation, a shipper, complained to the Interstate Commerce Commission that the C&NW railroad had unreasonably assessed

* Hon. Bailey Brown of the Sixth Circuit, sitting by designation.

some $19,000 in demurrage against it. The Commission dismissed the complaint and ordered Field to pay the assessment, and Field has petitioned us to set aside the Commission's decision. "Demurrage" in railroad parlance is the charge for a shipper's holding the railroad's cars for loading or unloading beyond a specified time, thereby depriving the railroad of their use; on the history of railroad demurrage see *Chrysler Corp. v. New York Central R.R.*, 234 I.C.C. 755, 759-61 (1939). Field's petition for review raises interesting questions with respect to the form of demurrage known as the "average agreement," but before we can reach them we must satisfy ourselves that we have jurisdiction.

Section 2321(a) of the Judicial Code gives the courts of appeals jurisdiction, made exclusive by section 2342(5), to review final orders of the ICC, except where Congress has otherwise provided, as it has done in section 1336(a) by giving the district courts jurisdiction to enforce or enjoin "any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures." So if this is a proceeding to enjoin an order to pay money, we have no jurisdiction.

The divided review of ICC orders is a vestige of legal evolution—about as useful, and as mischievous, as the human appendix. It goes back to 1906, when judicial hostility to the Commission, among other factors, led Congress in the Hepburn Act, 34 Stat. 584, to overhaul the procedure for judicial enforcement and review of the Commission's orders. See 1 Sharfman, Interstate Commerce Commission 24-25, 46-48 (1931). Section 5 of the Hepburn Act distinguished between judicial review of ICC orders for the payment of money and judicial review of other ICC orders, and as to the latter created a right of direct appeal to the Supreme Court from the initial review courts, which were the circuit courts (not to be confused with the courts of appeals, then called circuit courts of appeals). 34 Stat. 591-92. Continued dissatisfaction with judicial attitudes toward the Commission led

Congress a few years later to shift judicial review of ICC orders other than for the payment of money to a new court, the Commerce Court, a short-lived experiment in specialized federal appellate courts. See Frankfurter & Landis, The Business of the Supreme Court 153-74 (1928). Review of orders for the payment of money remained in the circuit courts. In 1913, amidst a chorus of complaints about the Commerce Court, see 50 Cong. Rec. 4531, 4537, 4540-41 (1913), Congress abolished it and transferred its jurisdiction to three-judge district courts, 38 Stat. 219; see *United States v. ICC*, 337 U.S. 426, 442 (1949), but without altering the jurisdiction of single-judge district courts—which had succeeded to the jurisdiction of the circuit courts upon their abolition two years before, 36 Stat. 1087—to review orders for the payment of money.

Given the judicial hostility in this period to regulatory agencies such as the ICC, and a bearable caseload in the Supreme Court, the dual system of judicial review made a certain amount of sense. Orders that might have national impact received initial scrutiny by three judges with a right of direct appeal to the Supreme Court. But since invalidating an order limited to the payment of money had little potential to disrupt the regulatory system, such orders were reviewed by a single district judge with a right of appeal only to the court of appeals, though the Supreme Court could of course review on certiorari. However, as the Supreme Court's caseload waxed and judicial hostility to regulatory agencies waned, the extraordinary review procedure for non-payment orders became an anachronism and it was finally abolished in 1975. 88 Stat. 1917. But instead of making all ICC orders reviewable in the standard modern fashion—that is, in the courts of appeals—Congress, without explanation, gave those courts only the review jurisdiction that the three-judge district courts had had, and left jurisdiction to review orders for the payment of money in the district courts. As a result, the only difference in judicial review of the two types of order is that the less important, the

order for the payment of money, gets an extra tier of review—review by a federal district court, in addition to review by the court of appeals, and by the Supreme Court on certiorari.

When an administrative order is based on a record, as ICC orders for the payment of money are, the reviewing court has no factfinding function, so there is no point in enlisting the federal district courts—trial rather than review courts—to provide an initial tier of judicial review. *Denberg v. United States Railroad Retirement Bd.*, 696 F.2d 1193, 1196 (7th Cir. 1983). And it is worse than pointless to do so with respect to only some of an agency's orders, so that proper classification becomes a litigable issue, and a party's mistake in classification can result in his losing his right to judicial review. But that is the system we have for ICC orders, and until Congress changes it we must make what sense we can out of it.

Although Field's complaint challenged the reasonableness of a demurrage assessment that it had not yet paid, the C&NW intervened and got the Commission to order Field to pay, and if that order, a payment order, were the only order Field was asking us to set aside, we would have to dismiss its petition for review. In *Pullman-Standard v. ICC*, 705 F.2d 875, 879-80 (7th Cir. 1983), we joined the District of Columbia Circuit in holding that the form of the order determines whether the district court or the court of appeals has jurisdiction to review it. See *Consolidated Rail Corp. v. ICC*, 685 F.2d 687, 694 (D.C. Cir. 1982). Other courts have held that not form but basis and potential impact determine jurisdiction. The Third Circuit held recently that an order denying a shipper's complaint for remission of demurrage was reviewable directly in the court of appeals because the petition involved "a challenge to the legal bases of the Commission's action . . . ." *Empire-Detroit Steel Division of Cyclops Corp. v. ICC*, 659 F.2d 396, 397 (3d Cir. 1981). But this is one of the decisions that *Pullman-Standard* rejected, see 705 F.2d at 878, in adopting the formal

approach. Although it would be better if the courts of appeals had exclusive review jurisdiction over all ICC orders, Congress has divided jurisdiction between the courts of appeals and the district courts, and the division should be clearly marked. This requires that all orders to pay, the consequential and the inconsequential alike, be reviewable only in the district courts.

But as it is well-settled that review of both a money and a nonmoney order must be sought in the court of appeals (*Pullman-Standard* was such a case), we must consider whether there is anything else that Field is seeking review of besides the order to pay demurrage. Its petition for review just asks us to set aside the Commission's decision, which dismissed Field's complaint. If Field had paid the demurrage and all its complaint asked was that the railroad be ordered to repay it, the Commission's decision would be reviewable in the district court because an order denying reparations, although it is not literally an order for the payment of money, is treated as one for purposes of determining which court has jurisdiction. *United States v. ICC, supra,* 337 U.S. at 441. But Field had not paid the demurrage, and therefore was not asking for its return. Its complaint asked for an order "commanding [C&NW] to cease and desist from the aforesaid violations of said act, . . . [and] direct[ing] the waiver [in whole or part] of the sum of demurrage charges demanded of complainant by [C&NW], . . . and that such other and further order or orders be made as the Commission may consider proper in the premises."

This language suggests two grounds for treating the Commission's order dismissing the complaint as more than a payment order. First, in asking that the railroad be forbidden to collect the demurrage that it had assessed, Field was asking for an injunction against the railroad, and an injunction is not a payment order. This may seem an unduly technical argument. The nature of the dispute is the same whether the railroad asks for reparations first or the shipper asks the Commission first to decide

whether reparations are due. By suing first Field precipitated the railroad's suit to collect demurrage and was therefore in effect bringing a declaratory judgment action, though not called that under the Commission's rules. A declaratory judgment, like an injunction, is equitable; but where the only dispute between two parties is over whether a particular sum of money is due from one to the other, it might seem that the spirit of section 1336(a), if it has a spirit, would require that review jurisdiction be in the district court. Otherwise there would be the same kind of arbitrary distinction between court of appeals and district court jurisdiction that led the Supreme Court in *United States v. ICC, supra,* to equate denials of reparations with reparation orders. But that case was decided at a time when the existence of a cumbersome procedure for the review of nonmoney orders provided a reason for interpreting the predecessor of section 1336(a) broadly. See 337 U.S. at 443. The abolition of that procedure argues for interpreting section 1336(a) narrowly, in accordance with the usual presumption that direct review of administrative action belongs in the court of appeals unless there is a factfinding function to be performed by the reviewing court.

An alternative and perhaps solider basis for our jurisdiction is that although in asking that the C&NW be ordered to cease and desist from its alleged violations Field may have meant no more than that it wanted the railroad ordered to stop dunning it for the $19,000, its complaint did allege "that the exaction of demurrage due to a condition not 'attributable to consignor or consignee' is unreasonable . . . ," which suggests that Field may have wanted the average agreement on demurrage reformed for the future. If so, it was asking for the partial cancellation of a tariff, as in *Pullman-Standard, supra,* 705 F.2d at 880, and we would have jurisdiction. Although it is not clear that this is what Field was asking for, the policy of routing review proceedings to the courts of appeals directly where the statutes will allow this en-

titles us to resolve our doubts in favor of jurisdiction—and come at last to the merits.

Demurrage is assessed according to one of two nationwide tariffs. The first provides for "straight demurrage," and if the shipper and railroad do not provide otherwise they are automatically governed by it. Under straight demurrage, for every day the shipper holds back a car beyond the period (usually two days) that he is allowed to keep it for loading he must pay the railroad $10, but after four days this rises to $20 and after six days to $30, the amount over $10 per day being referred to as a penalty. The shipper gets no credit for returning cars early but on the other hand is not assessed demurrage if severe weather or other circumstances beyond his control prevent him from returning the cars on time. The other type of demurrage is the "average agreement," under which the shipper gets a $10 credit against demurrage for every car that he returns within 24 hours of receipt but loses the excuses allowed under straight demurrage except for delay caused by floods, earthquakes, tornadoes, or hurricanes. A railroad cannot force a shipper into the average agreement—a point that gives the petitioner's argument that the average agreement is a "contract of adhesion" a hollow ring. Not only must the shipper agree to join the average agreement but he can on short notice unilaterally return to straight demurrage.

The average agreement has been held to be reasonable, see, e.g., *Monongahela Power Co.* v. *ICC*, 640 F.2d 504 (4th Cir. 1981), despite its narrowing of the shipper's excuses; and the petitioner's suggestion that it is somehow "anti-shipper" borders on the frivolous. Since the shipper can always stay with or return to straight demurrage, the average agreement simply enlarges the shipper's options—and you cannot be harmed by being given additional choices. Every contract allocates risks; the average agreement simply allocates them differently from straight demurrage. In straight demurrage, unexpectedly good weather is a boon to the railroad, be-

cause it gets its cars back faster without having to pay anything for this benefit, but unexpectedly bad weather hurts it. Under the average agreement unexpectedly good weather is a boon to the shipper because he gets demurrage credits for prompt return of cars but unexpectedly bad weather hurts him because he has to pay demurrage even when the weather prevents him from returning the cars within the specified period. The shipper who is pessimistic about the weather or doubtful of his ability to cope with bad weather will choose straight demurrage, and the shipper who is optimistic about the weather or about his ability to cope with bad weather will choose the average agreement. But no shipper is coerced to adopt the average agreement; it is his choice, and having chosen he must take the bad with the good. It was Field's misfortune that while operating under the average agreement—as it had been doing happily for 10 years—it was struck by the worst Chicago winter in memory, the winter of 1978-1979, and it was then that the demurrage in question accrued. Had Field stayed with straight demurrage the risk of unusually bad weather would have remained on the C&NW.

Besides challenging the principle of the average agreement, Field makes two narrower arguments. The first is that the C&NW never delivered the cars on which demurrage was assessed, and could not have done so, because they were frozen in C&NW's yard. But the fact that the cars never left the C&NW's yard is not important by itself. The average agreement provides for what is called "constructive placement," which means that for purposes of assessing demurrage the cars are deemed delivered when they are ready to be switchd onto the shipper's loading dock. The reason for this rule is plain enough. The shipper cannot be allowed to defeat the railroad's right to demurrage by refusing to accept delivery of cars after he has ordered them, and it would be wasteful to require the railroad, as a condition of preserving its demurrage rights, to trundle the cars up to the ship-

per's loading dock only to be told to take them back to the yard.

Field argues, however, that the principle of constructive placement is inapplicable if though the cars have arrived at the yard the railroad cannot deliver them to the shipper's loading dock. Field submitted an affidavit which stated that on the days on which it was assessed demurrage the cars were frozen in at the C&NW's yard and could not have been switched onto Field's siding even though, according to the affidavit, Field had cleared the siding of ice and snow and wanted and could receive cars. These allegations were not specifically controverted and the Commission made no finding that they were untrue. The Commission also accepted Field's contention that if weather prevents the carrier from delivering rather than the shipper from receiving cars the average agreement does not allow demurrage to be assessed. But the Commission noted that under the practice long followed by the parties the C&NW's duty to deliver cars, once it informed Field that the cars destined for Field had arrived at the local C&NW yard, was triggered by Field's calling the yard and requesting delivery of the cars, and that on the days in question no calls were made. In the Commission's view the failure to call barred Field from claiming that the cars had not been constructively placed because of the railroad's alleged inability to deliver the cars on those days.

At first glance this ground for awarding demurrage seems the very pinnacle of technicality. The railroad could not have been hurt by Field's failure to call for cars that the railroad could not have delivered. The only function of the call would have been to prevent the railroad from claiming demurrage. If Field was able and willing to accept delivery on those days, its failure to make the phone calls was an inadvertent omission, for which $19,000 is a big penalty. But the "if" is also big. The practice of calling for the cars after being notified of

their arrival at the yard was well established. If Field really could have received the cars at its siding on the days in question it had every reason to make calls in order to avoid having to pay demurrage. Its failure to do so casts doubt on the accuracy of its affidavit, thus providing practical support for the Commission's decision to treat calling as a condition precedent to Field's avoiding its obligations under the tariff.

Although the result may seem harsh, we cannot say that the condition itself is an unreasonable one, let alone an unconscionable one; and as Professor Farnsworth has pointed out recently, "In exercising their freedom of contract the parties [to a contract] are not fettered by any test of materiality or reasonableness. If they agree, they can make even an apparently insignificant event a condition." Contracts 538 (1982). This is what the Commission found the parties had done here. The Commission has been interpreting the average agreement for many years; and although contract interpretation is technically a question of law rather than fact, we think it simple prudence to defer to the Commission's interpretation when it is reasonable, whether or not it seems correct to us as an original proposition. Cf. *Illinois Terminal R.R. v. ICC*, 671 F.2d 1214, 1216-17 (8th Cir. 1982). Interpreting constructive placement under the average agreement as having occurred when Field failed to order the cars before the end of the day on which it was notified of their arrival at the switching yard simplifies the administration of the average agreement by eliminating the type of factual dispute that Field wanted the Commission to resolve. We cannot call this an unreasonable interpretation.

Field's second argument is that even if it was unable to receive cars because of the bad weather, a *force majeure* clause should be read into the agreement. Although acts of God and other unexpected events that prevent a party from performing his contractual obligations frequently do excuse performance under the rubrics of impossibility,

impracticability, frustration, *vis major*, or *force majeure*, they do so only when it is reasonable to suppose that if the parties had negotiated expressly with regard to the unexpected contingency that has prevented performance they would have wanted the performing party to be excused. It is not always reasonable. As Holmes pointed out a century ago, you can bind yourself to perform acts over which you have no control. "In the case of a binding promise that it shall rain to-morrow, the immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee." The Common Law 300 (1881). For modern authorities see references in Farnsworth, *supra*, at 684-85. So we must ask whether the average agreement implicitly assigned the risk of a terrible winter that would prevent Field from receiving cars to Field or to the C&NW, and the answer is to Field. The whole purpose of the average agreement is to shift the risk of unexpectedly bad weather to the shipper. The express exception for floods, earthquakes, tornadoes, and hurricanes leaves little doubt that the exclusion of severe winter storms was deliberate. Indeed, without such an exclusion it would be difficult to find any *quid pro quo* for the railroad's giving demurrage credits for early return of cars.

Last, Field argues that the Commission should have forgiven at least the penalty portion of the demurrage. But the so-called penalty is an intrinsic part of the average agreement which Field chose with its eyes open. The Commission was not obliged to rewrite the agreement in its favor. *Monongahela Power Co. v. ICC*, *supra*, 640 F.2d at 507-08; *Cleveland Elec. Illuminating Co. v. ICC*, 685 F.2d 170, 174 (6th Cir. 1982) (per curiam); *Illinois Central Gulf R.R.* v. *ICC*, 702 F.2d 111, 114 (7th Cir. 1983). Field does not argue that the common law doctrine that penalty provisions in contracts are unenforceable is applicable to demurrage.

The decision appealed from is

AFFIRMED.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

DECISION

No. 37458

FIELD CONTAINER CORPORATION

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

Decided: February 24, 1982

Defendant (C&NW) has filed a petition for administrative review of the decision of Review Board Number 1, served August 17, 1981, vacating an Administrative Law Judge (ALJ) decision served February 27, 1981. Complainant (Field) replied. While none of the grounds for accepting such an appeal are technically present,[1] the circumstances surrounding acceptance of complainant's late-filed appeal to the ALJ's decision apparently resulted in defendant's unintentional failure to file a reply at that stage of the proceedings.[2] This failure becomes signifi-

[1] Normally, petitioners must demonstrate that the petition involves a matter of general transportation importance. 49 CFR 1100.98(c)(2)(ii).

[2] No appeal was filed within the 20 day period following service of the original decision. On March 24, 1981, complainant submitted a petition to permit late-filing of an appeal, but on April 1, the Commission served a notice indicating that the ALJ decision had become the order of the Commission. On April 10, complainant filed a petition to vacate that order and to accept its appeal. Defendant apparently believed that the Commission would issue an order indicating its acceptance of the late-filed appeal prior to consideration of that appeal on the merits,

cant in light of the Review Board's action reversing a decision originally favorable to defendant. As complainant will not be prejudiced by our acceptance of this discretionary appeal, we will waive the requirements of 49 CFR 1100.98 in this instance. We reverse the decision of the Board, and affirm the ALJ decision.

In its original complaint, Field alleged that demurrage charges of $18,870 assessed by the C&NW on cars delivered during December 1978, and January and February of 1979 to Field's Elk Grove Village, IL facility were inapplicable because the cars had not been constructively placed on the dates stated by C&NW. In his dismissal of the complaint, the ALJ found that there was no specific evidence or proof in the record of this allegation, and placed primary importance upon the shipper's failure specifically to request cars. On appeal, the Review Board saw that failure unimportant in light of their conclusion that there had been no effective constructive placement of the cars.

Defendant argues that the Review Board's decision is contrary to the evidence of record. It claims that the failure physically to deliver the cars was solely due to the complainant's failure to issue instructions for placement.

We find that a determination of the issue in this case must be guided by the business agreement and arrangements between these two parties. An average agreement was in effect during the relevant time period, and we have established a clear policy of considering such voluntary agreements binding, precluding demurrage relief.

It appears from the somewhat sketchy evidence and pleadings (complainant has the burden of proof) that the carrier and shipper had an arrangement which governed

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[8] (Continued)
although the rules do not require this. It claims, therefore, to have been prejudiced by its failure to participate in the appellate proceeding.

the delivery of cars to the shipper's plant. This arrangement implemented the average agreement and, in effect, defined constructive placement. First, as cars arrived, the carrier had a duty to inform (by telephone) the shipper of the cars' availability and then to place the cars under "constructive placement." Second, as the shipper needed cars, its responsibility was to request (by telephone) that specific cars be delivered. Third, upon such request, the carrier was obligated to deliver the specific cars requested. If the carrier delivered late, the shipper's demurrage account was credited. If the shipper delayed requesting cars already constructively placed, its demurrage account was debited. The agreement clearly provided that the usual defense of bad weather would not preclude assessment of demurrage.

This average agreement, as used here and in other situations, mutually benefits shippers and carriers. Its benefit to the shipper here was to allow it to determine exactly what cars would be delivered and when. The carrier had standing instructions to hold all cars until requested to release specific ones. There was no evidence that any contrary instructions had been given by the shipper in light of the adverse winter weather conditions.

Therefore, the pivotal issue is whether cars had been requested. If cars were requested, then the carrier's obligation was to deliver them. If cars were not requested, then the carrier's obligation was never triggered and we need not reach the question of the carrier's actual ability to place the cars.

Field does not allege that it requested cars on a regular basis during this period but has argued instead that its failure to do so was excused by the abnormal weather conditions. The Review Board's statement that cars had been requested and not delivered apparently refers only to a few days on which the carrier could not deliver (and accordingly credited complainant's account) and certain Saturday and Sunday requests during which, by the terms of the agreement, the carrier was not obligated

to perform delivery. To the extent this question is further in issue, complainant has failed to present sufficient detailed evidence showing it requested cars but they were not delivered. As previously stated, the agreement between the parties did not provide for abeyance of demurrage due to weather conditions. Neither shipper nor carrier is excused from performance for this reason. Under their business arrangements, the carrier's obligation to deliver does not arise until triggered by a shipper request for cars—unmade here. Field now appeals to our equity powers to mitigate the apparent harshness of this result, claiming that the average agreement is a contract of adhesion. However, this approach ignores the fact that the agreement entered into by the parties was a voluntary one whose benefits accrued to both sides. The shipper could have allowed for the possibility of weather-caused delays in car requests through some contractual arrangement with the carrier; it did not choose to do so. Furthermore, it could have continued to request cars. If the carrier could not have actually placed them (a fact not clear in the record) no demurrage would have accrued. Complainant has not convinced us that equitable considerations weigh in its favor.

This decision will not significantly affect the quality of the human environment or conservation of energy resources.

It is ordered:

The Review Board decision is reversed and complainant shall pay demurrage charges amounting to $18,870.00. This proceeding is discontinued.

By the Commission, Division 2, Commissioners Gresham, Gilliam, and Taylor. Commissioner Taylor is assigned to this Division for the purpose of resolving tie votes. Since there was no tie in this matter, Commissioner Taylor did not participate.

Agatha L. Mergenovich
Secretary

(SEAL)

APPENDIX C

28 U.S.C. §2321(a)

Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in Chapter 158 of this title.

28 U.S.C. §2342(5)

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title.

28 U.S.C. §1336(a)

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures.

49 U.S.C. §10741(a) and (b) PROHIBITIONS AGAINST DISCRIMINATION BY COMMON CARRIERS

(a) A common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may not charge or receive from a person

a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered, or to be rendered, in transportation the carrier may perform under this subtitle than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.

(b) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title may not subject a person, place, port, or type of traffic to unreasonable discrimination. However, subject to subsection (c) of this section this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.

49 U.S.C. §10761(a) TRANSPORTATION PROHIBITED WITHOUT TARIFF

(a) Except as provided in this subtitle, a carrier providing transportation or service to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. §11701(b) GENERAL AUTHORITY

(b) A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath The Commission may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Commission may not dismiss a complaint made against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title because of the absence of direct damage to the complainant.